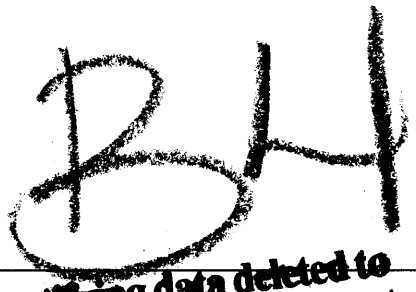

U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

identifying data deleted to prevent clearly unwarranted invasion of personal privacy

ADMINISTRATIVE APPEALS OFFICE
425 Eye Street, N.W.
BCIS, AAO, 20 Mass, 3/F
Washington, DC 20536

[redacted]

File: WAC 01 284 50318 Office: CALIFORNIA SERVICE CENTER Date APR 18 2003

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER:

PUBLIC COPY

[redacted]

INSTRUCTIONS:
This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Bureau of Citizenship and Immigration Services (Bureau) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

for Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based visa petition was denied by the Director, California Service Center. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a corporation organized in California in February 1997. It is engaged in the import, distribution and sale of electronic musical instruments. It seeks to employ the beneficiary as its president and chief executive officer. Accordingly, the petitioner endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager. The director determined that the petitioner had not established that the beneficiary would be employed in a managerial or executive capacity for the petitioner.

On appeal, counsel for the petitioner asserts that the director erred as a matter of fact by ignoring information provided and erred as a matter of law by misinterpreting the pertinent statute.

Section 203(b) of the Act states, in pertinent part:

> (1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):
>
> * * *
>
> (C) Certain Multinational Executives and Managers. -- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

The language of the statute is specific in limiting this provision to only those executives and managers who have previously worked for the firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and are coming to the United States to work for the same entity, or its affiliate or subsidiary.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this classification. The prospective employer in the

United States must furnish a job offer in the form of a statement that indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien. 8 C.F.R. § 204.5(j)(5).

The issue in this proceeding is whether the beneficiary will be employed in an executive or managerial capacity for the petitioner.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

> The term "managerial capacity" means an assignment within an organization in which the employee primarily-
>
> i. manages the organization, or a department, subdivision, function, or component of the organization;
>
> ii. supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
>
> iii. if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
>
> iv. exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

> The term "executive capacity" means an assignment within an organization in which the employee primarily-
>
> i. directs the management of the organization or a major component or function of the organization;
>
> ii. establishes the goals and policies of the organization, component, or function;

iii. exercises wide latitude in discretionary decision-making; and

iv. receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

It is not clear from the record whether the petitioner is claiming the beneficiary will be engaged in both managerial duties under section 101(a)(44)(A) of the Act, and executive duties under section 101(a)(44)(B) of the Act. However, it must be noted a petitioner must establish that a beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager if it is representing the beneficiary is both an executive and a manager. The petitioner may not claim a beneficiary will be employed as a hybrid "executive/manager" and rely on partial sections of the two statutory definitions.

On the I-140, Immigrant Petition for Alien Worker, the petitioner stated the beneficiary was "[r]esponsible for overall management and direction and control of all business activities." In a letter submitted by the petitioner in support of the petition, the petitioner referenced the beneficiary's executive experience and his management skills.

The director requested further evidence of the beneficiary's managerial or executive duties. The director specifically requested a more detailed description of the beneficiary's duties, a list of all employees under the beneficiary's direction, and the percentage of time the beneficiary spent on his duties. The director also requested the petitioner's organizational chart and copies of the petitioner's California Forms DE-6, Quarterly Wage Report, for the last year.

In response, the petitioner stated that the beneficiary would be "responsible for establishing, implementing and overseeing the company's long term goals and management procedures regarding overall operation of the company as well as procurement of all necessary employees and delegation of tasks and position to the staff members." The petitioner also indicated that, generally, the beneficiary would spend approximately 40 percent of his time involved in telephone conversations and meetings with the local distributors, 10 percent of his time involved with "A/S" customers, 15 percent of his time involved in discussions with the parent organizations, and 35 percent of his time involved in establishing long term goals and policies regarding overall company activities.

The petitioner also provided its California Form DE-6, Employer's Quarterly Wage Report for the third quarter of 2001. The California Form DE-6 showed two employees, the beneficiary and

one other individual. The petitioner further provided its organizational chart depicting a president and several companies as distributors.

The director determined that the petitioner's type of business did not have a reasonable need for an executive because the company only bought and sold products. The director also determined that because the petitioner employed only the beneficiary, the beneficiary would necessarily be involved in the numerous tasks involved in importing and distributing products. The director further determined that the beneficiary was a first-line supervisor of non-professional, non-managerial employees. The director also determined that the petitioner had not shown that the beneficiary managed or directed the management of a function rather than performing the operational activities of the function.

On appeal, counsel for the petitioner asserts that the director erred as a matter of fact because he improperly relied on the petitioner's staffing levels and determined that the beneficiary's position did not meet the definition of "executive management." Counsel also asserts that the director did not give the petitioner the opportunity to prove otherwise. Counsel also asserts that the petitioner did provide ample documentation regarding the beneficiary's executive management position. Counsel states that the position duties were "described in terms which are universally recognized as executive management and found in INA Section 101." Counsel contends that there is no basis in law for the director to focus on the petitioner's type of business, and thus, determine that as the petitioner only bought and sold products, the petitioner did not need an executive.

Counsel's assertions are not persuasive. In examining the executive or managerial capacity of the beneficiary, the Bureau will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). The petitioner has provided general descriptions of the beneficiary's duties. Stating that the beneficiary will be responsible "for overall management and direction and control of all business activities" does not convey a sense of what the beneficiary will be doing on a daily basis. This statement is simply a paraphrase of the first element of the "executive capacity" definition. *See* section 101(a)(44)(B)(i) of the Act. Counsel's statement that the description of the beneficiary's position contains terms that are universally recognized as executive underscores the deficiencies of this position description. The description contains no specificity relating the universally recognized terms to the beneficiary's actual duties.

The director's request for evidence also resulted in a broad description of the beneficiary's duties indicating that the beneficiary would establish, implement, oversee the company's

goals and management procedures, as well as procure the necessary employees. The petitioner stated that the beneficiary spent 35 percent of his time on this activity. However, as noted above, it is not clear from the record what specific duties the beneficiary is performing in relation to these tasks. The petitioner's allocation of time attributed to the beneficiary's duties does state that the beneficiary spends 40 percent of his time on the phone with the local distributors and another 10 percent of his time with "A/S" customers. However, these tasks are more indicative of a position that requires the beneficiary to primarily market and sell (on a wholesale level) the company's product. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). Moreover, the petitioner provides no supporting evidence of the 15 percent of the beneficiary's time spent communicating with the parent organizations. Going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. *Ikea US, Inc. v. INS*, 48 F.Supp. 2d 22, 24-5 (D.D.C. 1999); *see generally Republic of Transkei v. INS*, 923 F.2d 175 (D.C. Cir. 1991) (discussing burden the petitioner must meet to demonstrate that the beneficiary qualifies as primarily managerial or executive); *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972). Contrary to counsel's assertions, the petitioner did not provide ample documentation of the beneficiary's duties and the director did give the petitioner the opportunity to submit a clearer description of the beneficiary's duties in his request for additional evidence. The response was simply inadequate to overcome the deficiencies in the record.

Although the appeal will be dismissed, it must be noted that the director based his decision in part on an improper standard. In his decision, the director stated "the petitioning entity does not have a reasonable need for an executive because they are merely an import and distribution business. . . . all they do is buy and sell products." This comment is inappropriate. The director should not hold a petitioner to his undefined and unsupported view of "common business practice" or "standard business logic." The director should, instead, focus on applying the statute and regulations to the facts presented by the record of proceeding. Although the Bureau must consider the reasonable needs of the petitioning business if staffing levels are considered as a factor, the director must articulate some reasonable basis for finding a petitioner's staff or structure to be unreasonable. Section 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). The fact that a petitioner is a small business or engaged in sales or services will not preclude the petitioner from qualifying for classification under section 203(b)(1)(C) of the Act. For this reason, the director's decision will be withdrawn in part as it relates to the reasonable needs of the petitioning business.

In this instance at the time of filing, the petitioner was a four-year-old trading company that claimed to have a gross annual income of $574,756. The petitioner provided evidence that it employed the beneficiary and one other individual on a part-time basis and in an undisclosed position. The petitioner provides evidence that it has entered into several distribution agreements with other companies. However, as noted by the director, the beneficiary does not supervise these companies but simply has distribution agreements with them. The AAO declines to extend the concept of "employee" or "independent contractor" to a distribution company in this case. The petitioner has not provided adequate supporting evidence that these companies move the petitioner's product on a continuous and full-time basis. Based on the information in the record, the beneficiary, as the petitioner's president, is contributing to the performance of a majority of the operational tasks of the company. It is not possible to conclude that the reasonable needs of the petitioner are being served without the beneficiary performing a majority of the operational tasks of the company. Therefore, the petitioner has not submitted sufficient evidence on appeal, to overcome the director's decision on this issue.

Beyond the decision of the director, the petitioner has not established a qualifying relationship with the beneficiary's overseas employer. In order to qualify for this visa classification, the petitioner must establish that a qualifying relationship exists between the United States and foreign entities, in that the petitioning company is the same employer or an affiliate or subsidiary of the foreign entity. *See* section 203(b)(1)(C) of the Act.

The petitioner initially stated that it was a wholly-owned subsidiary of the foreign entity. The petitioner submitted a stock certificate to confirm that the overseas entity owned 1800 shares of the petitioner. However, the petitioner's Internal Revenue Service (IRS) Form 1120, U.S. Corporation Income Tax Return for 2000 at Schedule E shows that the beneficiary owns 100 percent of the petitioner's common stock. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582 (BIA 1988). For this additional reason, the petition will not be approved.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.

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